United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2062

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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In the Matter of the Application of
ALBERT MINTZER,

Petitioner-Appellant,

For A Writ of Habeas Corpus,

File No. 75-2062

-against-

STATE OF NEW YORK,

Respondent-Appellee,

PUBLIC SERVICE MUTUAL INSURANCE
COMPANY,

Respondent.

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BRIEF FOR APPELLEE

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TABLE OF CONTENTS

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BRIEF FOR APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Gurfein, J.) dated June 13, 1972 which denied appellant's application for a writ of habeas corpus and a further order dated August 7, 1972 as amended by order of August 15, 1972 which granted reargument but adhered to the original decisions denying the application in all respects.

History

Appellant was convicted after trial by jury in the Supreme Court, New York County (Saypol, J.) of the crimes of Grand Larceny, First Degree (Penal Law Sec. 1290) and Failing to File an Annual Report of Real Estate Syndicate Operation (Gen. Bus. Law Sec. 325-3-8, Sec. 359-g).

On July 13, 1964 he was sentenced to a term of 5 to 10 years on the grand larceny count and a suspended one year sentence on the Gen. Bus. Law convictions. He was paroled on September 22, 1969.

The judgment of conviction was affirmed by the Appellate Division, First Department, 23 A D 2d 821 (1965), and by the New York Court of Appeals, 16 N Y 2d 1051 (1965) a motion for reargument was denied, 17 N Y 2d 549 and a subsequent motion to renew the motion for reargument was denied 22 N Y 2d 828 (1968). The remittitur was amended 17 N Y 2d 491 (1966). Certiorari was denied 383 U.S. 936 (1966) as well as a writ of habeas corpus to the Supreme Court which was treated as a certiorari, 383 U.S. 949 (1966).

Thereafter, he sought a writ of habeas corpus in the Supreme Court, New York County (Helman, J.). That application was denied (N.Y.L.J. p. 8-9 Aug. 26, 1966).

Then, he sought a writ of habeas corpus in the United States District Court for the Southern District of New York (66 Civ. 3476). That application was denied by Judge Bryan on May 15, 1967 (not reported). The denial was affirmed by the Circuit Court, 403 F. 2d 42 (1967). Certiorari was again denied 340 U.S. 1044 (1968).

He returned to the State Courts and again sought habeas corpus relief, this time in the Supreme Court, Westchester County (Sirignano, J.). That application was denied, and affirmed by the Appellate Division, Second Department, 32 A D 2d 891 (1969). Leave to appeal to the New York Court of Appeals was denied, 25 N Y 2d 738 (1970). Certiorari was again denied, 396 U.S. 994 (1969).

The present application was commenced in 1966 prior to the application made to Judge Bryan. It appears to have been abandoned or dismissed by Judge Murphy but was reactivated in 1972 when Judge Gurfein received it under the then new individual assignment system and was advised that appellant still wished to litigate.

Judge Gurfein denied the petition on June 13, 1972, and, upon reargument adhered to that decision on August 7, 1972 and August 15, 1972, when a certificate of probable cause was granted.

On August 21, 1972 appellant served a notice of appeal.

On May 29, 1975 he served his brief.

The Case

The appellant, Albert Mintzer, dominated and controlled a complex of corporate entities which included The Sire Plan, Inc., Sire Plan Portfolios, Inc. and the Sire 30th Street Plan, Inc. He was the sole stockholder of The Sire Plan, Inc. which owned the voting stock in Sire Plan Portfolios, Inc. and Sire 30th Street Plan, Inc.

On or about March 15, 1961, Sire Plan Portfolios, Inc. commenced to offer securities of Sire 30th Street Plan, Inc. by means of an offering circular dated March 6, 1961.

The purported purpose of the sale of these securities as expressed in the offering circular, was to purchase an office building located at 110-112 East 30th Street, New York, New York. The Sire Plan, Inc. had entered into a contract with the owners of said building for its purchase. After a series of extensions this contract expired on October 15, 1961 and monies paid on the deposit were retained by the sellers. The contract was never reinstated and the building never acquired. The investors received nothing more than a so called interim certificate and 7% interest on their monies until October, 1962.

By April 20, 1961 Mintzer had raised $62,100.00 from the public. Instead of holding these monies in trust, as represented in the offering circular, he immediately commingled said sum with other funds and wrongfully disbursed it as the exigencies of the situation required for personal reasons and for corporate entities unrelated to Sire 30th Street Plan, Inc.

In a crude attempt to conceal the larceny the appellant, on April 20, 1961, caused certain transactions to be recorded on the books of The Sire Plan, Inc., Sire Plan Portfolios, Inc., and Sire 30th Street Plan, Inc. that ostensibly indicated the receipt of monies by Sire 30th Street Plan, Inc. Analysis of the books

and records of all three entities, exposed the true nature of this series of sham transactions and disclosed appellant's felonious intent, and proof of an intent not meant to be fulfilled.

Count 3 of the indictment charged grand larceny by use of false pretenses in that after April 20, 1961 when the appellant had caused such transactions to be recorded, he continued to offer additional securities using the same offering circular dated March 6, 1961 which stated that all monies would be kept in trust and that the purpose "is" to acquire the 30th Street building. As to every sale subsequent to April 20, 1961 the appellant falsely pretended that a trust fund had been kept and was being kept for the sole purpose of purchasing the aforesaid building at 110-112 East 30th Street. The representations were not promissory, nor did they relate to a future act and the investors relying on them were defrauded. The evidence presented by the People demonstrated that from the initial receipt of monies by the appellant these funds were not kept in trust and that the purpose of the offering was not to acquire the building.

The Indictment

The first count of the indictment charged appellant with common law larceny of $32,641,73 from certain named investors commencing from about April 20, 1961.

The second count charged appellant with grand larceny of trust funds in the same amount of $32.611.73 commencing from the same time from the same investors in violation of former Panal Law Sec. 1302.

The third count of the indictment charged the appellant with grand larceny of the sum of $35,700.00 by means of making false statements in an offering circular while acting as president of Sire 30th Street Plan, Inc. and while acting as president of Sire Plan Portfolios, Inc., the underwriter, also commencing from April 20, 1961 in violation of former Penal Law Sec. 1290. The false statement being: "All monies received by this company from the sale of these securities until actually employed in connection with the consummation of the transaction herein described will be kept in trust. . . ."

The clear import of the indictment is that representations were made to a series of potential investors and individually repeated to them by means of the offering circular while in fact no trust fund had ever been established. The investors had a clear right to believe, and did believe that with respect to prior purchasers, the terms of the offering had been fulfilled by the defendant.

The difference in amounts resulted from the fact that in the first two counts the figure of $32,641.73 allegedly represented the minimum amount obtained by appellant out of a total amount raised from the circular for which there was absolutely no explanation, whereas the sum of $35,000 in count 3 represented the total amount obtained from April 20, 1961 when the representations in the offering of March 15, 1961 were known to be false.

Due to the fact that the several counts clearly were variations of the same transaction the trial court simply submitted the third cound to the jury for consideration.

Appellants Contentions

Appellant now contends that the withdrawal of the first two counts by the trial Court after all the evidence was in was so prejudicial as to deprive him of a fair trial.

The Decision Below (Gurfein, J.)

With respect to the issue Judge Gurfein said "This claim of prejudice is cast in the most general terms and is unsupported by any authority, even though the petitioner is a former attorney. It is undoubted that a trial court may dismiss particular counts and allow the jury to consider evidence pertaining to the dismissed counts. United States v. O'Brien, 441 F. 2d 260 (5 Cir. 1971). While on occasion prejudice may result from such a practice, there is nothing in the record before me to suggest that the trial judge's power was abused or that there was any denial of fundamental fairness in Mintzer's case. Cf. United States ex rel. Mintzer v. Dros., 403 F. 2d 42, 43 (2 Cir. 1967), cert. denied, 390 U.S. 1044 (1968); United States ex rel. Castillo v. Fay, 350 F. 2d 400 (2 Cir. 1965), cert. denied, 382 U.S. 1019 (1966). The claim is, therefore, dismissed."

ARGUMENT

APPELLANT WAS NOT PREJUDICED BY THE WITHDRAWAL OF THE COUNTS 1 AND 2.

There is no question; as this Court found, and as the State Courts found on numerous occasions that there was overwhelming evidence establishing appellant's guilt.

In this case the indictment dealt exclusively with appellant's conduct in connection with raising public money for a particular project. All of the proof related to his activities in that connection. It was all indivisibly part of the total picture. Under the circumstances the trial court undoubtedly felt that count 3 was sufficient to present the facts for the jury's consideration. New York Crim. Proc. Law Sec. 300.40 subd. 6(b). As Judge Gurfein pointed out, there is nothing unusual about such a procedure either in the Federal or State Courts. See People v. Rudd, 41 A D 2d 875 (1973).

Appellant argues, nevertheless, that he was prejudiced. However he fails to point out how. The fact is that every bit of evidence was relevant proof upon the charge on which he stands convicted.

Appellant's reliance on United States v. Wolfson, 437 F. 2d 862 (2d Cir. 1970) is entirely misplaced. In that case 4 defendants went to trial; one, Kosow, was charged with conspiracy. The other three were charged with conspiracy and 3 substantive counts, perjury, subornation and obstruction of justice. The testimony against Kosow took four weeks and dealt only with certain of his dealings which predated the events alleged in the substantive counts and related to a different crime-fraud. Although the trial court dismissed that portion of the conspiracy count which dealt with Kosow's alleged fraud, the balance of that count - conspiracy to commit perjury, subornation and obstruction of justice - was allowed to be presented to the jury. This Court held, in effect, that the trial of the fraud alleged in the conspiracy count against Kosow could very well have been severed from the charge of conspiracy against him and the 3 co-defendants for perjury, subornation and obstruction (id p. 871).

In this case appellant stood alone. The testimony elicitated related solely to his activities in a single transaction from which there were "separate and distinct legal consequences to a single fact situation". United States v. Wolfson, supra, 437 F. 2d 862, 873; Overstreet v. United States, 321 F. 2d 459 (5th Cir. 1963), cert. den. 376 U.S. 919 (1964).

The trial court simply decided to submit the case on the last count. Obviously appellant could not have been prejudiced by the reduction of the possibilities of conviction. Salinger v. United States, 272 U.S. 542, 548-549 (1926); Marsh v. United States, 344 F. 2d 317 (1965).

Appellant's reference, therefore, to People v. Dumar, 106 N.Y. 502 (1887) and People v. Ginsberg, 274 App. Div. 1007 (1948) are inapposite, inasmuch as above noted, this Court has already found that there was evidence supporting the conviction. United States ex rel. Mintzer v. Dros., 403 F. 2d 42 (2d Cir. 1967), cert. denied, 390 U.S. 1044 (1968).

CONCLUSION

THE ORDER SHOULD BE AFFIRMED.

Dated: New York, New York
June , 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MORTIMER SATTLER
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSALIN FANN , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 20th day of June , 1975 , she served the annexed upon the following named person :

ALBERT MINTZER
Petitioner-Appellant Pro Se
242 West 38th Street
New York, New York 10018

Pro Se
~~Attorney~~ in the within entitled proceeding by depositing
3 copies
~~a~~ true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Pro Se ~~Attorney~~ at the address within the State designated by him for that purpose.

Rosalin Fann
ROSALIN FANN

Sworn to before me this
20th day of June , 1975

Mark Seal
Assistant Attorney General
of the State of New York